STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL S. SHERMAN, D.O., P.C., d/b/a PHYSICIAN EYE CARE ASSOCIATES OF GARDEN CITY, and MICHAEL S. SHERMAN, D.O.,

Plaintiffs/Counter-Defendants-Appellees,

v

SHIRLEY T. SHERROD, M.D., P.C., and SHIRLEY T. SHERROD, M.D.

Defendants/Counter-Plaintiffs/Third-Party Plaintiffs-Appellants,

and

GARDEN CITY HOSPITAL,

Third-Party Defendant-Appellee.

UNPUBLISHED
May 30, 2013

No. 299045
Wayne Circuit Court
LC No. 08-014212-CK

MICHAEL S. SHERMAN, D.O., P.C., d/b/a PHYSICIAN EYE CARE ASSOCIATES OF GARDEN CITY, and MICHAEL S. SHERMAN, D.O.,

Plaintiffs/Counter-Defendants-Appellees,

v

SHIRLEY T. SHERROD, M.D., P.C., and SHIRLEY T. SHERROD, M.D.,

Defendants/Counter-Plaintiffs/Third-Party Plaintiffs-Appellants,

No. 299775
Wayne Circuit Court
LC No. 08-014212-CK

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and

GARDEN CITY HOSPITAL,

Third-Party Defendant.

MICHAEL S. SHERMAN, D.O., P.C., d/b/a PHYSICIAN EYE CARE ASSOCIATES OF GARDEN CITY, and MICHAEL S. SHERMAN, D.O.,

Plaintiffs/Counter-Defendants-Appellees,

v

No. 308263
Wayne Circuit Court
LC No. 08-014212-CK

SHIRLEY T. SHERROD, M.D., P.C, and SHIRLEY T. SHERROD, M.D.,

Defendants/Counter-Plaintiffs/Third-Party Plaintiffs-Appellant,

and

GARDEN CITY HOSPITAL,

Third-Party Defendant,

and

MERRILL LYNCH PIERCE FENNER & SMITH, INC.,

Garnishee-Defendant-Appellee.

Before: CAVANAGH, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM.

In docket nos. 299045 and 299775, Shirley T. Sherrod, M.D., P.C. and Shirley T. Sherrod, M.D. (defendants Sherrod), appeal as of right the trial court's opinions and orders granting summary disposition and case evaluation sanctions to Michael S. Sherman, D.O., P.C. doing business as Physician Eye Care Associates of Garden City and Michael S. Sherman, D.O., (plaintiffs), and third-party defendant Garden City Hospital (Garden City). In docket no.

308263, defendants appeal by leave granted the trial court's orders and opinion regarding the freeze of defendants' assets and a writ of garnishment served on Merrill Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch). On this Court's order, these three appeals have been consolidated for appellate review. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

Defendants Sherrod entered into a purchase agreement to sell their ophthalmology medical practice to plaintiffs for $245,000. Before the sale, defendants Sherrod retained Richard Knuff to conduct a business valuation of the practice, and he concluded that it was worth $422,202.58, with the goodwill valued at $181,048.58. Defendants Sherrod agreed to use all reasonable efforts to transfer their goodwill to plaintiffs, and support the transfer in every possible way so that plaintiff Michael Sherman would receive the benefit of defendants' goodwill. Contemporaneous with the purchase agreement was an employment agreement executed between defendant Shirley Sherrod and Garden City. Defendant Shirley Sherrod agreed to continue working for the practice, part-time, for one year, in exchange for $50,000 as compensation.

Despite these agreements, the relationship between Dr. Sherman and Dr. Sherrod soon deteriorated. According to Sherman, defendant Sherrod refused to inform the staff that plaintiffs now owned the practice, refused to give him the keys to the offices, refused to give up control of the billing process, and insisted that her name and billing numbers be used. Sherrod, on the other hand, claimed that Sherman was performing unwarranted medical procedures and cashing checks that rightfully belonged to her. Sherrod sent a series of emails to Knuff, expressing her dissatisfaction with the employment situation and her desire to leave. In an email dated September 27, 2008, Sherrod wrote that she had stopped working that week and would not return.

A meeting between the parties and Gary Ley, president and CEO of Garden City, occurred on October 1, 2008. Sherrod claims that she informed the parties that she reported Sherman's behavior to the Office of the Inspector General, and Ley reportedly stated that Sherrod would be hearing from his lawyers. After this meeting, a series of letters between Ley and Sherrod ensued, which culminated in Ley writing to Sherrod that he accepted her resignation effective September 30, 2008.

Plaintiffs subsequently filed a complaint against defendants Sherrod alleging numerous causes of action, including breach of contract. Defendants Sherrod filed a counterclaim against plaintiffs for breach of contract and an accounting, and filed a third-party complaint against Garden City for a violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. Plaintiffs moved for summary disposition on their breach of contract claim pursuant to MCR 2.116(C)(10), and on defendants' counterclaims, which the trial court granted. The trial court also granted summary disposition to Garden City on the WPA claim pursuant to MCR 2.116(C)(10). Both Garden City and plaintiffs were granted case evaluation sanctions, despite defendants' objections and request for a new case evaluation because case evaluation proceeded with only two panel members. After a lengthy procedural history in this Court, defendants now appeal as of right and by leaved granted in these consolidated appeals on several grounds.

II. SUMMARY DISPOSITION

A. Standard of Review

A grant or denial of a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). The motion for summary disposition "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing a motion for summary disposition under MCR 2.116(C)(10), a court considers "affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Greene v A P Prods, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (quotation marks and citations omitted).

B. Whistleblowers' Protection Act

"The elements of a prima facie case under the WPA are well established: (1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action." *Wurtz v Beecher Metro Dist*, 298 Mich App 75, 84; 825 NW2d 651 (2012) (quotation marks and citation omitted); *Anzaldua v Neogen Corp*, 292 Mich App 626, 630-631; 808 NW2d 804 (2011). "The determination whether evidence establishes a prima facie case under the WPA is a question of law that this Court reviews de novo." *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 278; 608 NW2d 525 (2000).

At issue in this case is the second element of the prima facie case, namely, whether Sherrod was discharged or discriminated against. Following a string of emails wherein Sherrod discussed her dissatisfaction with plaintiff Sherman, she sent an email to Knuff on September 3, 2008, stating that an "exit in 30 days is the best option at this time." Then, on September 27, 2008, Sherrod sent an email to Knuff stating that she no longer felt they were on a "problem solving track." In response to an inquiry about her not showing up to work that week or the previous week, she wrote: "All patients canceled on Monday. I worked Tuesday and Wednesday. *I will not return*." Consistent with these emails, Knuff testified that Sherrod walked out of the practice before meeting with Ley on October 1st. When asked when she stopped performing services for Sherman, Sherrod stated: "I believe that was sometime in September." Thus, the facts demonstrate that rather than being fired, Sherrod quit her employment before the October 1st meeting where she supposedly informed Garden City of her reporting behavior.

Defendants Sherrod, however, contend that subsequent letters sent between the parties demonstrate that Garden City did not think Dr. Sherrod quit before the October 1st meeting. Garden City sent Sherrod a letter on October 10, 2008, wherein Ley requested another meeting to discuss whether an employment relationship could continue. Dr. Sherrod replied, stating that she was puzzled by the letter, as she felt that she made it clear she could no longer work with

plaintiffs. Ley subsequently replied, stating that he accepted her resignation effective September 30, 2008. Defendants contend that these letters indicate that Garden City did not think Sherrod had quit her employment before October 1st. Defendants also highlight testimony from Knuff, who stated that Sherrod was willing to continue her employment. Yet, contrary to defendants' assertions, this evidence does not establish that Sherrod was still working on or after the October 1st meeting. At most, this evidence displays Sherrod's potential willingness to return to work after she voluntarily quit, not that she was still working.

We also reject defendants' argument about constructive discharge. "A constructive discharge is established where an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation or, stated differently, when working conditions become so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to resign." *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1994) (quotation marks and citation omitted). There is no evidence that a constructive discharged occurred in this case. First, there is no evidence of any deliberate action from Garden City that created intolerable working conditions. Rather, defendants have vehemently and repeatedly claimed that it was plaintiff Dr. Sherman's behavior, not Garden City's, that defendant Sherrod found so objectionable. Furthermore, defendants cite no authority for the proposition that a constructive discharge occurs merely when an employer violates the law in a way that offends an employee. Summary disposition was properly granted to Garden City.

C. Plaintiffs' Breach of Contract Claim

Defendants next argue that there is a genuine issue of material fact regarding plaintiffs' breach of contract claim because Sherrod did not quit her employment. However, as discussed above, there is no genuine issue of material fact regarding Sherrod's decision to quit her employment. In doing so, she failed to adhere to her obligations under the purchase agreement to transition the practice and transfer her goodwill.

Defendants Sherrod maintain that it was plaintiffs who first breached the contract, and, thus, plaintiffs cannot recover for any subsequent breach by Sherrod. Defendants allege that plaintiffs' breach occurred when they failed to engage in fair and transparent billing procedures. However, defendants do not identify or explain on appeal what behavior constituted a failure to use transparent billing procedures. They also failed to cite to any specific provision in the contract that requires plaintiffs to engage in fair and transparent billing.

This Court repeatedly has held that it is not enough "for a party simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). While defendants make expansive proclamations in the lower court about the issue of billing, such as Sherman's use of defendants' billing numbers constituted a lack of fair and transparent billing, "[m]ere conclusory allegations that are devoid of detail are insufficient to demonstrate that there is a genuine issue of material fact for trial." *Bennett v Detroit Police Chief*, 274 Mich App 307, 317; 732 NW2d 164 (2006).

We agree with plaintiffs that there is no genuine issue of material fact regarding whether defendants first breached the contract, thereby causing plaintiffs damage. Nevertheless, we do find that there is a genuine issue of material fact regarding the amount of damages. "The party asserting a breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate result of the breach." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). A party's "remedy for breach of contract is limited to damages that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 426 n 3; 751 NW2d 8 (2008) (quotation marks and citation omitted). While "damages that are speculative or based on conjecture are not recoverable . . . it is not necessary that damages be determined with mathematical certainty; rather, it is sufficient if a reasonable basis for computation exists." *Chelsea Inv Group LLC v Chelsea*, 288 Mich App 239, 255; 792 NW2d 781 (2010).

Here, plaintiffs sought to recover for defendants' breach of contract when Sherrod quit her employment. Plaintiffs requested and received $181,048.58, representing the amount of goodwill in the business, as calculated in the business valuation report that defendants Sherrod had prepared in expectation of selling the practice. Yet, damages are generally "an issue of fact, and questions of fact are, of course, generally decided by the trier of fact[.]" *McManamon v Redford Tp*, 273 Mich App 131, 141; 730 NW2d 757 (2006). While plaintiffs claim that the business valuation report represented the amount of goodwill in the business, this report was current as of December 31, 2006, and the purchase agreement was not executed until May 23, 2008. Moreover, even if the loss of goodwill is the appropriate measure of damages, plaintiffs failed to produce any evidence, such as expert testimony, demonstrating that defendants' breach resulted in a loss of any or all of the goodwill in the practice.

Because there is a genuine issue of material fact regarding the amount of damages plaintiffs sustained as a direct and natural result from defendants' breach, the trial court erred in holding otherwise.

D. Defendants' Counterclaims

Defendants Sherrod next posit that summary disposition on their counterclaims was improper because the trial court ignored several statements in Sherrod's affidavit. They contend that in her affidavit, Dr. Sherrod "recounted how she discovered a check on which her endorsement had been forged." While she may have discovered such a check, defendants provided no evidence demonstrating that plaintiffs were responsible for the alleged forgery. Defendants also argued that Sherrod explained in her affidavit "how several thousand dollars of receivables to which she alone was entitled were lost because of Dr. Sherman's billing practices." Yet, as plaintiffs note, Sherrod's affidavit actually stated: "I *believe* several thousands of dollars of my receivables disappeared because of these circumstances."

This Court has recognized that "[o]pinions [and] conclusionary denials . . . do not satisfy the court rule [MCR 2.116(C)(10).]" *Marlo Beauty Supply, Inc v Farmers Ins Group of Companies*, 227 Mich App 309, 321; 575 NW2d 324 (1998), modified *Harts v Farmers Ins Exch*, 461 Mich 1 (1999).

Lastly, defendants contend that in her affidavit, Dr. Sherrod addressed why she was entitled to an accounting. However, in their counterclaim, defendants alleged an action for breach of the contract. "An action for an accounting is equitable in nature. . . . An accounting may not be had where the action is for a specific sum due under a contract. An accounting is unnecessary where discovery is sufficient to determine the amounts at issue." *Boyd v Nelson Credit Centers, Inc*, 132 Mich App 774, 779; 348 NW2d 25 (1984) (citations omitted). Because defendants' counterclaim was for a breach of contract, they would not be entitled to the equitable relief of an accounting. Defendants have failed to demonstrate that summary disposition on this issue was improper.

III. CASE EVALUATION SANCTIONS

A. Standard of Review

Defendants Sherrod next argue that the trial court erred in granting case evaluation sanctions to plaintiffs and Garden City.

"A trial court's decision whether to grant case evaluation sanctions presents a question of law, which this Court reviews de novo." *Tevis v Amex Assurance Co*, 283 Mich App 76, 86; 770 NW2d 16 (2009). This Court reviews a trial court's award of attorney fees and costs for an abuse of discretion, which occurs when the decision falls outside the range of reasonable and principled outcomes. *Van Elslander v Thomas Sebold & Assoc, Inc*, 297 Mich App 204, 211; 823 NW2d 843 (2012).[1]

B. Analysis

"The purpose of case evaluation sanctions is to shift the financial burden of trial onto the party who demands a trial by rejecting a proposed case evaluation award." *Tevis*, 283 Mich App at 86. MCR 2.403(D)(1) requires that "[c]ase evaluation panels shall be composed of 3 persons." In the instant case, it was discovered at case evaluation that counsel for third-party defendant Garden City was one of the three panel members scheduled for the case evaluation. After discovering the obvious conflict, he recused himself from the panel, leaving only two panel members who ultimately proceeded with case evaluation.

Defendants contend that because the case evaluation panel was defective, plaintiffs and Garden City were not entitled to case evaluation sanctions. While defendants are correct that MCR 2.403(D)(1) requires case evaluation panels to be composed of three people, that is not the end the inquiry. As the Michigan Supreme Court has stated, "[n]o procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a

[11] In docket no. 299045, defendants include in their issues presented section a challenge to the trial court's denial of their motion for a new case evaluation. Yet, they failed to include this issue in the analysis section, and have therefore waived it. Accordingly, this issue only will be tangentially discussed as it relates to the other issues on appeal.

tribunal having jurisdiction to determine it." *People v Vaughn*, 491 Mich 642, 654; 821 NW2d 288 (2012) (quotation marks and citation omitted). Here, defendants submitted an affidavit from their attorney claiming that she did not waive defendants' right to a three person panel, and that she was told she had to proceed with only two panel members. Plaintiffs and Garden City, on the other hand, claim that defendants did not object to proceeding with only two panel members and never mentioned any reservations, even in discussions after case evaluation.

Essentially, the resolution of this issue depends on whose assertions were more credible, and the trial court believed Garden City and plaintiffs. As this Court has repeatedly recognized, "[w]e defer to the trial court's credibility determinations given its superior position to make these judgments." *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011). Further, it is noteworthy that defendants have not disputed that they only brought the defect to the court's attention *after* they received the results of the case evaluation, which they ultimately rejected. "It seems to be pretty well settled that, after one has knowledge of an irregularity, he cannot remain silent, and take his chances of a favorable verdict, and afterwards, if the verdict goes against him, base error upon it." *Wicklund v Draper*, 167 Mich App 623, 627; 423 NW2d 294 (1988), quoting *Samper v Boschma*, 369 Mich 261, 265; 119 NW2d 607 (1963). Also significant is that plaintiffs signed their statement of understanding of case evaluation with an attached form that had the three evaluators names listed, and Garden City counsel's name was crossed out with the statement: "didn't sit b/c of conflict[.] All parties agreed." This is further evidence that defendants did indeed agree to proceed with only two evaluators.

The decision to award case evaluation sanctions to Garden City is affirmed. However, as discussed above, there is a genuine issue of material fact regarding the damages that plaintiffs sustained as a result of defendants' breach of contract. Thus, on remand, the trial court also should address whether the amount of case evaluation sanctions awarded to plaintiffs should be modified in light of these further proceedings.

IV. ASSET FREEZE AND WRIT OF GARNISHMENT

As all parties are willing to stipulate to the release of the asset freeze and the writ of garnishment, this issue is moot. Because plaintiffs agree to the relief requested in defendants' brief on appeal, there is nothing for this Court to decide, and "[a]s a general rule, an appellate court will not review a moot issue." *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 493; 608 NW2d 531 (2000). Accordingly, the relief requested should be granted.

V. CONCLUSION

The trial court properly granted summary disposition to Garden City on defendants' WPA claim and summary disposition to plaintiffs on defendants' counterclaims. In regard to plaintiffs' breach of contract claim, the trial court properly found that there is no genuine issue of material fact in regard to defendant Sherrod quitting her employment and breaching the contract. However, there is a genuine issue of material fact regarding the amount of damages resulting from that breach. Also, while the decision to award case evaluation sanctions to plaintiffs and Garden City was proper, the trial court should consider on remand whether the amount should be modified for plaintiffs. Lastly, as all parties agree to release the asset freeze and the writ of

garnishment, defendants' requested relief should be granted. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Michael J. Riordan